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SENATE NATURAL RESOURCES COMMITTEE
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TESTIMONY IN SUPPORT OF HB 94

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Introduction

Mr. Chairman and members of the committee, my name is John Arrigo. I am administrator of the DEQ Enforcement Division and I am here to testify in support of HB 94. I would first like to thank Rep. Van Dyk for sponsoring this bill. HB 94 amends the Underground Storage Tank Act to address an oversight from legislation that was passed last Session and to correct some internal inconsistencies that were identified when the bill was drafted.

If you refer to the handout it will be easier to understand the bill. Last Session the Legislature passed HB 429, which standardized penalty calculation factors in 16 different environmental laws administered by DEQ. HB 429 created 75-5-1001 and inserted it into the UST law at 75-11-525(1)(b). The new penalty factors in Section 75-5-1001 shown on the top of the handout are: nature, extent, gravity, circumstances, history, economic benefit, good faith and cooperation, amounts voluntarily expended and other matters as justice may require. Rules have been passed to implement the new standard penalty calculation process and the system is working very well.

The handout also highlights the existing penalty factors in Section 75-11-525(4) of the UST law that duplicate the new factors in 75-1-1001. These existing factors should have been repealed by HB 429 in the last Session but this was missed in the bill drafting. Section 3 of HB 94, on page 4 lines 21-27 repeals the old penalty factors in 75-11-525(4).

HB 94 also contains amendments to make the UST law internally consistent. The inconsistencies are between Sections 75-11-512 and 75-11-525. Section 75-11-512 authorizes DEQ to issue administrative corrective action orders. Service of corrective action orders is complete upon mailing and may be appealed to the Board of Environmental Review. Section 75-5-525 authorizes DEQ to issue administrative penalty orders. Service of penalty orders is complete upon receipt and the penalty orders may be appealed to the Department.

Because many of our administrative orders require corrective action and assess a penalty, the method of service of the order must be consistent. We mail all of our orders as certified mail return receipt requested. Most certified letters are signed for and received. But if a violator chooses not to sign for certified mail from the Department, service of the order would not be complete. In these instances, DEQ hires the sheriff or a process server to serve the order. DEQ prefers that service be complete upon the date of mailing to eliminate the excuse that someone did not receive certified mail. You can see on Page 3, line 24, that the original amendment changed receipt to mailing and to make it consistent with 75-11-512.

However, due to concerns about fairness expressed during the House Natural Resources Committee hearing on HB 92, an amendment was passes to change mailing back to receipt in 525 and to amend 75-11-512(1) to change mailing to receipt. Section 2 on page 2, line 13 contains this amendment.

In the matter of appeals, because the Department issues the orders, we do not want to be authority responsible for hearing the appeals. Over the past DEQ has tried to change all the laws to move appeals to the Board, however we overlooked this appeal process in the UST law. Therefore, amendments proposed in Section 3 on page 4, lines 7 and 8 of the bill change the appeal of penalty orders to the Board of Environmental Review to be consistent with 75-11-512. The remaining language that is stricken in 75-11-525(3) eliminates duplication of 75-11-525(2).

Another item that is amended out of the UST law by HB 94 is a schedule of maximum and minimum penalties for specific violations. DEQ currently has rules that list penalties for specific violations of the UST law. However, these rules are out of date because they do not list all the possible specific violations and the penalties do not conform to the new penalty factors. Also, some of the new penalty factors, such as good faith and cooperation, are directly related to the behavior of the individual violator. We cannot predetermine whether a violator acted in good faith, calculate a penalty and publish it in rules, prior to the violation occurring. Therefore it is not appropriate to publish a schedule of penalties. We want to follow the new law and calculate a penalty that is specific to the violation and the behavior of the violator.

To address this difficulty, HB 94 strikes language that refers to a penalty schedule on page 4, line 21, and from the rulemaking authority listed in Section 1, on page 1, line 30.

Mr. Chairman, this concludes my testimony on HB 94 and I will remain available for questions.

HB 94 - Amend Underground Storage Tank Act penalty factors Background Information

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75-1-1001 (2005 - HB 429). (Effective January 1, 2006) Penalty factors. (1) In determining the amount of an administrative or civil penalty, the department of environmental quality or the district court, as appropriate, shall take into account the following factors:

(a) the nature, extent, and gravity of the violation;

(b) the circumstances of the violation;

(c) the violator's prior history of any violation, which:

(i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(ii) must be documented in an administrative order or a judicial order or judgment issued within 3 years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(iii) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;

(d) the economic benefit or savings resulting from the violator's action;

(e) the violator's good faith and cooperation;

(f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and

(g) other matters that justice may require.

75-11-525. Administrative penalties for violations -- appeals -- venue. (1) (a) A person who violates any of the provisions of this part or any rules promulgated under the authority of this part may be assessed and ordered by the department to pay an administrative penalty not to exceed $500 for each violation. This limitation on administrative penalties applies only to penalties assessed under this section. Each occurrence of the violation and each day that it remains uncorrected constitutes a separate violation. The department may suspend a portion of the administrative penalty assessed under this section if the condition that caused the assessment of the penalty is corrected within a specified time. Assessment of an administrative penalty under this section may be made in conjunction with any order or other administrative action authorized by this chapter.

(b) Penalties assessed under this subsection (1) must be determined in accordance with the penalty factors in 75-1-1001.

(4) The department shall publish a schedule of maximum and minimum penalties for specific violations. In determining appropriate penalties for violations, the department shall consider the gravity of the violations and the potential for significant harm to the public health or the environment. In determining the appropriate amount of penalty, if any, to be suspended upon correction of the condition that caused the penalty assessment, the department shall consider the cooperation and the degree of care exercised by the person assessed the penalty, how expeditiously the violation was corrected, and whether significant harm resulted to the public health or the environment from the violation.